to accord preferential treatment over other creditors.

On these grounds I hold that the Official Assignee is entitled to the orders prayed for in the motion and I order accordingly.

Order accordingly.

Solicitors: *Gibbs & Co.; N. Sharma.*

ANDAVAN v. THONG NYIK LIN

[O.C.J. (Ismail Khan J.) April 13, 1965]

[Seremban — Originating Summons No. 15 of 1963]

Practice and procedure — Res Judicata.

The respondent had executed two charges over her land in favour of the applicant, a moneylender. The applicant brought an action to enforce the security. The application was resisted, *inter alia*, on the ground of *res judicata*. It appeared that the applicant had brought a previous application against the respondent and this had been dismissed on a preliminary point, namely that there was no compliance with section 21 of the Moneylenders Ordinance, because of the applicant's failure to produce the statement of accounts when the summons was issued.

Held: the plea of *res judicata* cannot succeed as the former application had been dismissed on a technical defect in the proceedings and there had been no judicial determination of the matter directly and substantially in issue between the parties.

Cases referred to:—

(1) *Kali Krishna Tagore* v. *Secretary of State* I.L.R. 16 Cal. 173.

(2) *Putali Meheti* v. *Tulja* I.L.R. 3 Bom. 223.

(3) *Pethaperumal Chetti* v. *Murugandi Servaigaran & Ors.* I.L.R. 18 Mad. 446.

ORIGINATING SUMMONS.

N. Ramachandran (*Saraswathi Devi* with him) for the applicant.

S. Ponniah for the respondent.

Ismail Khan J.: The respondent had executed two charges over her land comprised in Negri Sembilan Certificate of Title No. 9090 for Lot No. 6444 Town and District of Seremban in favour of the applicant, a moneylender, as security for two sums of $6,700 and $4,000 lent to her. The two charges were executed on 6th October and 14th November, 1961, respectively. In these proceedings the applicant seeks to enforce his security, the respondent having made default in payment of the sums due in respect of the two charges.

The application is resisted on several grounds, one of them being that the matter is *res judicata*. It was agreed that this plea of *res judicata* should be dealt with first. It was pointed out by Mr. Ponniah for the respondent that the applicant had brought a similar application in Originating Summons No. 62 of 1962 which was dismissed and that such dismissal precluded a fresh action. To invoke the doctrine of *res judicata* the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it.

To see what was decided in the previous application, it is necessary to look at the judgment itself, because, as was observed by the Privy Council in the case of *Kali Krishna Tagore* v. *The Secretary of State*:(1)

> "In order to see what was in issue in a suit or what has been heard and decided, the judgment must be looked at. The decree is only according to the Code of Civil Procedure to state the relief granted or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided."

It is clear from the judgment in Originating Summons No. 62 of 1962 that the application was dismissed on a preliminary point taken, namely, that there was no compliance with section 21 of the Moneylenders Ordinance, 1951, because of the applicant's failure to produce the statement of account when the summons was issued. It was held that the proceedings were void *ab initio*.

In the case of *Putali Meheti* v. *Tulja*,(2) West J. said:—

> "When a suit has failed through a formal defect, and the merits have not been so pronounced on as to constitute a legal relation resting on the act of the court, another suit is not, by the English law, barred. This rule is consonant to justice and agrees with the law as set forth in the Code of Civil Procedure."

In the case of *Pethaperumal Chetti* v. *Murugandi Servaigaran & Ors.*,(3) the plaintiff sought to recover principal and interest due on a bond executed by the defendants in favour of his father (deceased). The plaintiff had previously brought a similar suit which was dismissed because the plaintiff had failed to produce a succession certificate. It was held that the previous proceedings did not bar a fresh suit. Subramania Ayyar J. referred with approval to the remarks of West J. in the case of *Putali Meheti* v. *Tulja* and said:—

> "It appears to me that the real effect of a failure to produce a certificate....whether such production should take place at the institution of a suit or at some later stage, is to prevent a court from pronouncing on the merits so as to render its decision an adjudication having the force of *res judicata*."

In the light of the above authorities and bearing in mind the reasons for the dismissal of the application in Originating Summons No. 62 of 1962, it seems to me that the former judgment proceeded wholly on a technical defect in the proceedings. There was no judicial determination of the matter directly and substantially in issue between the parties, namely, liability of

the respondent to the applicant, in the previous action which would bar the present application.

The plea of *res judicata* therefore fails.

I shall hear the summons.

Order accordingly.

Solicitors: *Kamala Devi & Co.; Stanley Ponniah.*

HAJI MOHAMED PAIMAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi J.) July 12, 1965]

[J.B. — Muar Criminal Appeal No. 2 of 1965]

Criminal Law and Procedure — Trial — Sanction — Sanction produced only at trial of accused — Proceedings nullity — Immigration Ordinance, 1959, ss. 6(1)(c), 57 and 58(2).

The appellant had been charged with the offence of knowingly harbouring an illegal immigrant, an offence under section 6(1)(c) of the Immigration Ordinance, 1959. Section 58(2) of the Ordinance provided that no prosecution shall be instituted in respect of an offence under the Ordinance without the sanction in writing of the Controller, of the Public Prosecutor or his deputy. The appellant was originally charged in court on March 10, 1964, but a written saction was not produced till the date of the trial on July 25, 1964. The sanction was signed on July 23, 1964.

Held: the written sanction should have been produced when the appellant was charged in court and as this was not done the proceedings were a nullity and the conviction must be set aside.

Cases referred to:—

(1) *Thorpe* v. *Priestnall* [1897] 1 Q.B. 159.

(2) *Tengku Abdul Aziz* v. *Public Prosecutor* [1951] M.L.J. 185.

CRIMINAL APPEAL.

Dato' David Marshall for the appellant.

Hamzah bin Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Azmi J.: The appellant was convicted on the following two charges:

(1) "That you sometime in the month of January, 1964 at Parit Perepat, Rengit did knowingly harbour a person, an illegal immigrant namely Atan bin Bujang whom you had reasonable grounds for believing to have acted in contravention of section 6(1)(c) of the Immigration Ordinance No. 12/59, thereby committing an offence under section 56(1)(d) of the Immigration Ordinance and punishable under section 57 of the said Ordinance."

(2) "That you sometime in the month of January, 1964 at Parit Perepat, Rengit did knowingly harbour a person, an illegal immigrant namely Adnan bin Omar whom you had reasonable grounds for believing to have acted in contravention of section 6(1)(c) of the Immigration Ordinance No. 12/59, thereby committing an offence under section 56(1)(d) of the Immigration Ordinance and punishable under section 57 of the said Ordinance."

and was sentenced to a fine of $1,000 on each charge or, in default, 3 months' imprisonment.

There are several grounds of appeal against the conviction but, with the agreement of the learned Deputy Public Prosecutor, Dato' Marshall proceeded firstly on one ground only. That ground reads as follows:

"There was a miscarriage of justice in that

b) the prosecution on the said charges was instituted without any sanction in contravention of explicit statutory prohibition."

The relevant statutory provision in that respect is section 58(2) of the Immigration Ordinance which reads as follows:

"(2) No prosecution shall be instituted in respect of any offence against this Ordinance or any regulation made thereunder without the sanction in writing of the Controller or of the Public Prosecutor or his Deputy."

There is a proviso to this subsection and it reads:

"Provided that nothing herein shall prevent any police officer or immigration officer from exercising his powers to arrest or detain any person under the provisions of this Odinance."

The facts of this case would show that the appellant was arrested on the 10th of March, 1964, and was brought to the court the same day, where the two charges were read to him and he claimed trial.

The trial, after several adjournments, had actually commenced on 25th July 1964. At the trial the learned Legal Adviser, who appeared for the prosecution, produced a sanction under section 58(2). That sanction was signed by him on 23rd July, 1964.

Dato' Marshall said that the sanction was given about 4½ months after the appellant was first charged on the 10th of March, 1964. At that time no sanction was produced and, therefore, the whole proceedings before the learned president had been a nullity. He cited me the case of *Thorpe* v. *Priestnall* [1] and the local case of *Tengku Abdul Aziz* v. *Public Prosecutor*.[2]

In the case of *Thorpe* v. *Priestnall*, the appellant was convicted under the Sunday Observation Act, 1676. The Sunday Observance Prosecution Act, 1871, provides that no prosecution shall be instituted for any offence under the Act of 1676 except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed.

The information was laid on the 6th July, 1896, for an offence the appellant was alleged to have committed under the Act on July the 5th, 1896. The summons was issued on July the 6th calling on the appellant to appear on July the 15th. The summons was served personally on July the 7th. The chief constable gave his verbal consent when it was asked on July the 6th, but it was not until the next day that he signed the written sanction. It was held